STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. Pen-22-250

KeyBank National Association

PLAINTIFF-APPELLANT

v.

Elizabeth Keniston et al.

DEFENDANT-APPELLEE

ON APPEAL FROM THE BANGOR DISTRICT COURT
Docket No.: BANDC-RE-2018-60

BRIEF FOR THE APPELLANT

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Table of Contents

Table of Authorities

Other Authorities

Statement of the Facts and Procedural History

The subject property to this foreclosure is located at 2488 Union Street, Hermon, Penobscot County, Maine (the "Property") (See Home Equity Line of Credit Mortgage at A. 47). Elizabeth E. Keniston and Frederick L. Keniston are the named mortgagors (collectively the "Mortgagors") and owned the Property as joint-tenants. (See Complaint for Foreclosure by Civil Action at A. 17 ¶ 8). However, only Frederick L. Keniston signed the underlying promissory note, in the original principal amount of $35,000, secured by the mortgaged Property (See Key Equity Options Agreement (Promissory Note) at A. 29). Additionally, only Frederick L. Keniston was a guarantor to a loan modification of the promissory note and mortgage[1] (See Modification and Extension of Promissory Note / Mortgage at A. 41).

Frederick L. Keniston died intestate[2] on October 3, 2011. Prior to the foreclosure action, no administration of the decedent's Estate was ever opened. On May 25, 2018, KeyBank National Association (hereinafter the "Plaintiff" or the "Appellant") filed a Complaint for Foreclosure by Civil Action, Title to Real Estate Involved (See Complaint for Foreclosure by Civil Action at A. 17). On June 29,

[1] Elizabeth E. Keniston appears on each of the loan documents (the Home Equity Line of Credit (promissory note), the Modification and Extension, and the Home Equity Line of Credit Mortgage) solely in her capacity as mortgagor but holds no personal liability on the debt obligation.

[2] A person is said to die intestate when he dies without making a will or dies without leaving anything to testify what his wishes were with respect to the disposal of his property after his death. BLACK'S LAW DICTIONARY 6th Ed. 6th Reprint-1997.

2018, an Amended Complaint was filed to name an inadvertently missed party-in-interest (See First Amended Complaint for Foreclosure by Civil Action A. 23). Because the sole note-signor was deceased, as more fully expounded below, Plaintiff was required under Maine case law, and further supported by the Maine Probate Code[3], to name as Defendants Elizabeth E. Keniston and the Heirs to the Estate of Frederick L. Keniston.

On April 5, 2022, a bench trial was heard in Bangor District Court (*Jon Lucy, J.*). Pursuant to the Court's request, post-hearing briefs were submitted to address the propriety of whether Plaintiff appropriately named the Heirs of the Estate as a party defendant. On June 30, 2022, a Decision and Order[4] followed with instruction to name the Estate of Frederick L. Keniston as a defendant debtor on any further or renewed foreclosure action. This appeal followed.

Statement of the Issues Presented for Review

At the conclusion of Plaintiff's bench trial, the trial court requested that Plaintiff submit for clarification the basis for and the authority upon which Plaintiff named each heir of the decedent. The trial court's request again invites this Court to

[3] On March 5, 2020, pursuant to 18-C M.R.S. § 1-302(1)(A) and 18-C M.R.S.§ 3-108(2), the Penobscot County Probate Court (*Hon. A. Faircloth*) exercised the authority to determine the heirs of the decedent and issued an Order that determined the decedent's only heirs-at-law. The named Heirs to the Estate of Frederick L. Keniston are Blaine Keniston, Stephen Sanford, Frederick L. Keniston, Jr. and Juanita Bowden.

[4] On June 30, 2022, a Decision and Order issued whereby Plaintiff's complaint was dismissed *without prejudice*.

explore the intersection between mortgage foreclosure and the probate process. From this request, the following appellate issues have been generated.

1. Whether the Plaintiff properly commenced this foreclosure action by naming as Defendants the Heirs of the Estate of Frederick L. Keniston?
2. Did the Plaintiff's actions, in so naming as Defendants the Heirs of the Estate of Frederick L. Keniston, comport with the Maine Probate Code and under what authority did Plaintiff move to so name as Defendants the Heirs of the Estate of Frederick L. Keniston?
3. Does the Court's decision to dismiss Plaintiff's foreclosure action with instruction to name decedent's Estate as party defendant-when no agent for service of process exists-contravene our current case law and statutory jurisprudence?

Standard of Review

The lower Court's decision is based on conclusions of law and not on factual findings. Accordingly, no abuse of discretion need be found for the Law Court to reverse the decision. Instead, the Court reviews this case de novo. "To the extent that interpretation of a statute is required … [the Court] review[s] the statutory construction de novo." *Kilroy v. Northeast Sunspaces, Inc.*, 2007 ME 119, ¶ 6, 930 A.2d 1060; *see also*, *McKeeman v. Cianbro Corp.*, 2002 ME 144, ¶ 7, 804 A.2d 406, 408 (matters of law are reviewed de novo).

Respecting the within, the facts are not in dispute. This appeal turns on whether or not Plaintiff, as a matter of law, properly named the borrower's heirs as defendants in the foreclosure. A de novo review on this limited legal issue is required. As set forth herein, the trial court's improvident interpretations of the Maine Probate Code and this Court's decision in *MTGLQ Investors, LP v. Alley*, 2017 ME 145, were incorrect. Furthermore, to do as the trial court suggests would abrogate statutory law and undermine, if not eviscerate, unassailable standing case law.

Argument

1. Plaintiff did properly commence this foreclosure action by naming as Defendants the Heirs of the Estate of Frederick L. Keniston.

It is commonly understood that real property automatically passes to the surviving joint tenant upon death. In a foreclosure action, assuming that each joint tenant signed the loan documents-the promissory note and the mortgage-a civil action can commence against the surviving party as named defendant only. However, this choice of tenancy is of little value should only one titled owner to the property sign the promissory note and a foreclosure action commence greater than 3-years after the note signer's death. The within foreclosure action presents this scenario.

Maine Rule of Probate Procedure sets forth the following restrictions under 18-C M.R.S.A. §3-108(1) respecting probate appointments:

> Limitations period; exceptions. *An informal probate or appointment proceeding* or formal testacy or appointment proceeding, other than a proceeding to probate a will previously probated at the testator's domicile and appointment proceedings relating to an estate in which there has been a prior appointment, *may not be commenced more than 3 years after the decedent's death* . . . (emphasis added)

Maine Probate Courts do, however, possess ongoing powers, even after the 3-year timeframe set forth in §3-108(1), to determine heirs. 18-C M.R.S.A. §1-302 gives the Probate Courts jurisdiction "over all subject matters relating to …[the] determination of heirs and successors of decedents."

The very fact that §1-302 exists shows the Legislature's recognition that such adjudication might be needed in matters like the Keniston case, where no probate was timely filed under §3-108, yet the need for a foreclosure action requires the determination of the heirs – as the heirs are the only defendant entities in existence. It is the heirs, therefore, who must be named in a foreclosure action so postured. Here, Plaintiff complied with the probate statutes and obtained the proper Order allowing it to proceed with its foreclosure against the decedent's heirs. Given Plaintiff's statutory compliance and compliance with Maine case law as set forth below, its case should not have been dismissed.

"Repeatedly, this court has unequivocally declared that the plain meaning of a statute as manifested on its face will control its interpretation. *Atlantic Oceanic Kampgrounds, Inc. v. Camden National Bank*, 473 A.2d 884, 887 (Me 1984). Because our sole note signer was deceased at the commencement of this foreclosure, the preclusive effect of §3-108(1) to name a special administrator or personal representative required that the Plaintiff petition the Probate Court to determine Frederick L. Keniston's heirs to be named and included as defendants. Upon a proper determination, each heir was correctly included as Heir of the Estate in order to "nominally" hold the place of defendant respecting the debt interest created by the promissory note. As a consequence of not being able to administer the decedent's estate, the Plaintiff's foreclosure complaint had to account for all persons of direct 1st party lineal decent to name in his stead. This legal proposition is not without support:

> "In an action to foreclose a mortgage . . . necessary and indispensable parties must be joined in a foreclosure proceeding of that property in order to make a decree of foreclosure valid." 55 Am. Jur. 2d Mortgages § 562

Further to the point that the proper parties were so named and assigned, Maine Rule of Civil Procedure 19 (a) states that

> "[a] person who is subject to service of process *shall be joined as a party* to the action if (1) in the person's absence complete relief cannot be accorded among those already parties . . ." Id.

See also *Muther v. Broad Cove Shores Ass'n,* 2009 ME 37, ¶ 9, 968 A.2d 539 ("Joinder is required in circumstances where the absence of the unnamed parties would prevent a judgment from fully adjudicating the underlying dispute, expose those who are already parties to multiple inconsistent obligations, or prejudice the interests of absent parties."); See also *Ocwen Federal Bank, FSB v. Gile,* 2001 ME 120 ¶ 12, 777 A.2d 275, 208 (a necessary party is one whose absence prevents the court from finally determining the matter before it).

Of no small consequence, the heirs, as defendants, are necessary and indispensable to the foreclosure by virtue of their ability to be served, and to be "nominal" placeholders of the decedent's debt obligation as mortgagor; although not personally liable for the mortgage debt, the heir's presence secures the mortgagee's ability to later realize its equitable potential at foreclosure sale. Consequently, as discussed further below, a failure to include the heirs in this action would bar and eliminate the mortgagee's ability to attain satisfaction on the debt at foreclosure sale; to name the Estate, as promulgated by the trial court, is not only statutorily impermissible, but would fail under M.R. Civ. P 4(c) and (h), as service on such a "party" could not be perfected.

If the consequence flowing from *Alley* is that the mortgage debtor is a needed and necessary party to the action, it presupposes the presence of a corporeal being, one who is able to be *served with process,* to stand as a nominal defendant for the

debt interest under that promissory note. Absent the inclusion of this person, the mortgagee is immediately forestalled from being able to prove a necessary element of its foreclosure: the amount due on the mortgage note. The trial court's directive to name the Estate, as the interested debtor party, operates as both a misapprehension of the *Alley* analysis and as reversible error.

As a threshold matter, a foreclosure requires the inclusion of all needed and necessary parties to fully and completely adjudicate the case on its merits; this would include the note debtor. See generally *MTGLQ Investors, L.P. v. Alley* (citations omitted). Typically, one would find that a foreclosure defendant signed both the promissory note and the mortgage security instrument. However, if there are multiple titled landowners, but a single signer to the note, as is the situation in this case, the note signer must appear and be represented at foreclosure *in some capacity*: either specifically named as a party Defendant, or if deceased, named through a nominally appointed special administrator or personal representative for the estate, or through an appropriate finding of the decedent's heirs. Id. at ¶ 4. Important to this Court's consideration is that their decision in *Alley* opined that the missing party was "presumably" the Estate but expounded no further as to the different iterations a decedent's interest may take. Id. The opportunity is now before this Court to address the narrow proposition presented in *Alley* and elucidate on this issue further by

providing a comprehensive range of people or entities who are necessary parties to a foreclosure action.

2. Plaintiff, in naming as Defendants the Heirs of the Estate of Frederick L. Keniston, did follow the Maine Probate Code and did comply with the directives outlined in *MTGLQ Investors, L.P. v. Shelley Alley*.

Perhaps no case speaks to the important and structural integrity of Plaintiff's argument than *Alley* as this Court's procedural analysis was determinative to the process Plaintiff undertook in this action. *Alley* itself provides us guidance and support for the propriety and necessity of naming the decedent's heirs as defendants. Although not directly reflective, those issues previously heard in *Alley* were under such similar circumstances.

To properly account for and address all necessary elements for foreclosure, the Plaintiff at trial is required, as an initial step, to insure that there was a defendant "debtor" to the note obligation in order to prove a breach of condition in the mortgage. As presented at trial, through the introduction of each respective loan document and further supported by direct testimony, Frederick L. Keniston was established to be the sole note signer, and he alone bore the full debt obligation. In order for the Plaintiff to exercise its equitable right to the property, a "debtor" in foreclosure had to be named as nominal defendant in order for Plaintiff to proceed;

the Probate Court's determination of Frederick L. Keniston's heirs-at-law satisfied this need.

There are close parallels between *Alley* and this foreclosure wherein this Court has stated "there is a dispositive threshold issue regarding the absence of the debtor as a necessary party." *Alley*, 2017 ME 145 at ¶ 3. In summation, the Court said, "we conclude that the debtor is a necessary party to this foreclosure action." Id. ¶ 8. "Thus, without the debtor . . . the court cannot fully and fairly decide the contractual dispute on which the creditor's entitlement to reach and sell the property depends." Id. ¶ 7. In doing so, this Court determined that a foreclosure action mandates the inclusion of the debtor. Complicating the matter, due to statute of limitation restrictions imposed by the Maine Probate Code, neither a special administrator nor a personal representative was allowed to assume this role, and Plaintiff was left with the only option to name the decedent's heirs-at-law as the nominal "debtor" party. Absent the inclusion of the Heirs of the Estate, the ensuing trial would result in a failure of Plaintiff to prove necessary elements of the foreclosure. As this Court stated in *Alley*, "the crux of the dispute is therefore whether and to what extent the debtor met [his] contractual obligations to the bank [i.e. those set out in the note]. Id. ¶ 6.

As will be expounded on in greater detail below, in so naming the Heirs of the Estate of Frederick L. Keniston as Defendants, the Plaintiff did follow the Maine

probate code, and further, complies with both Maine statute and the Law Court's directives authored in *MTGLQ Investors, L.P. v. Shelley Alley.*

3. **The Court's decision to dismiss Plaintiff's foreclosure action with instruction to name decedent's Estate as a party defendant-when no agent for service of process exists-erodes the legal requirements articulated in *Chase Home Finance, LLC v. Higgins* and *MTGLQ Investors, L.P. v. Shelley Alley* and further closes the eye to statutory governance under 14 M.R.S. § 6322 and the Maine Probate Code.**

Whether a party is necessary to the litigation therefore depends on what elements of proof must be established, based on the cause of action alleged in that particular litigation. See *Housing Sec., Inc. v. Me. National Bank*, 391 A.2d 311, 315 (Me. 1978). "Among the necessary elements of foreclosure in Maine are the plaintiff's proof, by a preponderance of the evidence, of both "a breach of the condition of the mortgage" and "the amount due on the mortgage note . . ." *MTGLQ Investors, LP v Alley* at ¶ 6. The aforementioned elements of proof flow directly from the earlier decision heard in *Chase Home Finance, LLC v. Higgins*, 2009 ME

136, ¶ 11, 985 A.2d 508, 510-511, in which this Court set forth the full eight elements of proof to support a judgment of foreclosure[5].

In line with the preceding decisions, and critical to this examination, are the following enumerated elements codified under 14 M.R.S. § 6322 that mandate what a court *shall* determine in order to award judgment:

- A breach of condition in the mortgage.
- The amount due on the mortgage note, including any reasonable attorney fees and court costs.
- The order of priority and any amounts that may be due to other parties in interest, including any public utility easements.

As clearly delineated by statute, it is not only imperative, but it is a requirement that Plaintiff's proof include a presentation to the trier of fact of a breach

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1. The existence of the mortgage, including the book and page number of the mortgage, and an adequate description of the mortgaged premises, including the street address, if any.

2. Properly presented proof of ownership of the mortgage note and the mortgage, including all assignments and endorsements of the note and the mortgage.

3. A breach of condition in the mortgage.

4. The amount due on the mortgage note, including any reasonable attorney fees and court costs.

5. The order of priority and any amounts that may be due to other parties in interest, including any public utility easements.

6. Evidence of properly served notice of default and mortgagor's right to cure in compliance with statutory requirements.

7. Proof of default of mediation.

8. A statement, with a supporting affidavit, of whether or not the defendant(s) is in military service in accordance with the Servicemembers Civil Relief Act.

of condition, and also **the amount due on the mortgage note**. In order to sufficiently present the note obligation owed, it becomes incumbent upon the Plaintiff to make an offer of proof where a corporeal being is present to "hold" that obligation (of the decedent) for the benefit of the Plaintiff; for the mortgagee to exercise its rights to the debt at sale, it must do so against a nominal holder of the debt. As support to this argument, this Court has concluded that a "mortgagee was not precluded from foreclosing on the mortgage . . . **because the debt itself still remained** . . ." *Johnson v. McNeil*, 2002 ME 99, ¶ 13 (emphasis added).

The Maine foreclosure statutes themselves contemplate heirs of the mortgagor as parties. Upon a successful judgment of foreclosure, which presupposes a determination that a breach of condition was found with a corresponding amount due on the note, a "sale must issue providing that **if the mortgagor or the mortgagor's successors, heirs** and assigns do not pay the sum the court adjudges to be due and payable . . .the mortgagee shall proceed with a sale . . ." (emphasis added) 14 M.R.S. § 6322. See also 14 M.R.S. 6323 ("Upon expiration of the period of redemption, if the mortgagor **or the mortgagor's successors, heirs** or assigns

have not redeemed the mortgage, any remaining rights of the mortgagor to possession terminate.") (Emphasis added).

Moreover, it has been consistently ruled that "[a] plaintiff seeking foreclosure judgment 'must comply with all steps required by statute.'" *Bank of America v. Greenleaf*, 2014 ME 89, 96 A.3d 700, quoting *Higgins* 2009 ME 136 at ¶ 11. See also *KeyBank Nat'l Ass'n v. Sargent*, 2000 ME 153, ¶ 36, 758 A.2d 528, 537 (for a mortgagee to legally foreclose, all steps mandated by statute must be strictly performed) and see also *Camden Nat'l Bank v. Peterson*, 2008 ME 85, ¶ 21, 948 A.2d 1251, 1257 (stating that a party seeking foreclosure must comply strictly with all steps required by statute).

Further to the point underscored by *Johnson* and invoked by *Alley*, that the "debtor's" interest must be included, is the U.S. Supreme Court decision stating that

> "even after the debtor's personal obligations have been extinguished, the mortgage holder still retains the **"right to payment" in the form of its right to the proceeds from the sale of the debtor's property**. Alternatively, the creditor's surviving right to foreclosure on the mortgage can be viewed as a "right to an equitable remedy" for the debtor's default on the underlying obligation. Either way, there can be no doubt that **the surviving mortgage intertest corresponds to an "enforceable obligation" of the debtor** (emphasis added) *Johnson v. Home State Bank*, 501 U.S. 78 at 84 (1991). See also *Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. 552.

Comparatively, although dealing in the context of a note's 6-year statute of limitations restrictions, this Court nonetheless said

> "[T]he running of the period of limitations during which the provisions of the note may be enforced does not eliminate the existence of the debt obligation itself, nor does it abrogate the mortgage securing the debt or affect the foreclosure remedies available to the mortgagee."

Johnson v. McNeil, 2002 ME 99, ¶ 13. The same is true here. Even though the sole note signor died, and a subsequent lack of any probate or estate having been timely filed, the mortgage debt continues, and the mortgagee's foreclosure remedies remain available and viable. In this case, practicality and logic dictate that, with no Estate entity for the deceased borrower in existence, Frederick L. Keniston's heirs step into his shoes as defendants in this *in rem* proceeding. Otherwise, there would be no means to exercise those available foreclosure remedies. That is why the practice within the Maine Probate Courts, pursuant to their powers under 18-C M.R.S. §1-302 to determine heirs, is to issue Orders Determining Heirs to foreclosing mortgagees, if the foreclosing mortgagee properly proves the foundational grounds for each heir and specifies why such a determination order is required. This is the same undertaking and the same steps followed by Judge Faircloth with respect to Frederick L. Keniston: she issued an Order Determining Heirs for the purpose of establishing the proper defendants in the mortgagee's necessary foreclosure action. The district court failed to honor the Order Determining Heirs when it dismissed the Plaintiff's case.

CONCLUSION

In sum, for the reasons discussed above, this Court should determine that the Plaintiff correctly and properly named the Heirs of the Estate of Frederick L. Keniston as defendants. Further, in this determination, it should be Ordered that the foreclosure action be remanded to the district court with specific direction to reinstate to the docket and review all trial evidence to determine whether Plaintiff carried its burden by a preponderance and whether a judgment of foreclosure is to issue.

October 26, 2022

KeyBank National Association

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CERTIFICATE OF SERVICE

I John Michael Ney, Jr., Esq., certify that on the date indicated below, I have sent two copies of the Appellant's Brief to each of the parties listed below by United States Mail, first-class, postage prepaid, addressed as listed below:

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